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Supreme Court of the United States

OCTOBER TERM—1966

No. 405

MILTON LEVY, MEYER GOLD and GELT CONSTRUCTION CO., INC., a corporation of the State of New Jersey,

Petitioners,

vs.

SAL LIMANDRI and LIM-LOW CONSTRUCTION CO., INC., a corporation of the State of New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Jurisdiction

This case involves an order of the Appellate Division of the Superior Court of New Jersey, denying the opening of a default judgment entered against the petitioners for failure to answer interrogatories more completely. The judgment was affirmed and certification denied by the Supreme Court of New Jersey, on May 17, 1966. Jurisdiction is conferred on this court by 28 U. S. C., Sec. 1257 (3).

Questions Presented

Is the abuse of due process, which occurs when a Court's discretionary powers are used arbitrarily and unjustly, reviewable by the United States Supreme Court where:

(a) a meritorious defense was suppressed for failure to give more specific answers to interrogatories, and a final judgment entered against defendants?

(b) defendants have suffered a final judgment against them while in the exact same circumstances and for the exact same reasons a plaintiff would be required to suffer less than a final judgment, i.e. are defendants to be treated differently under the law than plaintiffs?

(c) a judgment is entered against a party for procedural wrongdoing when that wrongdoing consists of acts by his attorney?

Constitutional Amendment Involved

Amendment XIV—Due Process of Law

Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule Involved

New Jersey Revised Rules, Rule 4:62-2 (In Part)

On motions, with briefs, and upon such terms as are just the court may relieve a party or his legal representative

from a final judgment, order or proceeding for the following reasons:

(a) Mistake, inadvertence, surprise or excusable neglect.

Statement

Defendants were sued by plaintiffs in January, 1964. A Complaint was filed on January 10th of that year (D1a). They responded by retaining an attorney namely, William Kaufman of the law firm of Kaufman and Kaufman, Esqs., Elizabeth, New Jersey, to defend and counterclaim. On January 29th, within the proper time for filing such pleadings, Mr. Kaufman caused an Answer and Counterclaim to be filed (D5a). These pleadings joined the issue. It seemed that the plaintiffs claimed that they were unpaid for bricks and labor supplied to the defendants' construction site. The defendants claimed that payment was regular and proper, and they denied a balance due as claimed by the plaintiffs. They alleged the statute of frauds (D6a-29). Other allegations by the defendants effectively established that a meritorious defense existed. This was also asserted in the opinion of their attorney (D53a, 20).

Thereafter, the management of the suit was left by the defendants in the hands of their attorneys. It is the understanding of the defendants that their attorney served notice to take oral depositions upon the plaintiff, Sal Limandri, on February 19, 1964 (D53a-30). These depositions were argued about, postponed and a new date finally set in the office of David Cohn, the attorneys for the plaintiff. On the date that they were to be taken, Mr. Kaufman did not appear to take them (D53a-34).

After Mr. Kaufman gave notice of taking depositions, he was served with Interrogatories by Mr. Cohn. The defendants received notice that they should supply answers, by several letters and by some telephone calls from Mr. Kauf-

man. The questions were not fully understood by the defendants (D37a-31). No personal conferences were held, however, in spite of the fact that the defendants were in and out of the office of Mr. Kaufman (D54a-25). Mr. Kaufman was of the opinion that the failure to formulate answers was not wilful or deliberate (D54a-30).

Plaintiffs' attorneys motioned the court for an Order striking the Answer and appearance of the defendants for failure to answer Interrogatories. That Order was returnable on the 17th of April, 1964. Mr. Kaufman did not appear to respond and an Order was entered compelling the answers to Interrogatories, on that date.

A further notice of motion was served on Mr. Kaufman by the attorneys for the plaintiffs, reiterating the threat of entry of judgment, on May 26, 1964, returnable on June 5, 1964, and again Mr. Kaufman did not appear, but at this time the Interrogatories were answered (D12a). The answers were prepared by Mr. Kaufman as the result of the defendants giving to him Memoranda of answers (D19a).

These did not satisfy the attorney for the plaintiffs and he moved for more specific answers on June 30, 1964. The return day of that motion was July 9, 1964. Mr. Kaufman did not appear on the return date and an Order was entered compelling more specific answers, on that day. In the meantime, it is to be noted that the depositions which Mr. Kaufman requested to be taken of the plaintiff, Sal Limandri, were not taken. Thereafter, more specific answers were not supplied to the plaintiffs' attorney and he moved for a default judgment (D26a). An Order was entered to that effect and a date set for proofs for entry of such judgment on October 14, 1964. To neither of these hearings did Mr. Kaufman respond, nor did he appear. Mr. Kaufman indicated by affidavit that he did not receive such notice even though the plaintiffs' attorney demonstrated a postal re-

turn receipt indicating notice given to Mr. Kaufman. Mr. Kaufman alleges that he warned his clients to answer Interrogatories. The defendants, however, indicated that they were confused by the questions and relied entirely on Mr. Kaufman's ability as an attorney. Thereafter, an Order for judgment was entered (D31a) and new attorneys substituted for Kaufman and Kaufman, namely, Warren, Chasan, Leyner and Holland, Esqs., Jersey City, New Jersey (D33a).

Mr. Chasan of that firm moved to set aside the judgment but did not argue the responsibility of Kaufman and Kaufman, and in fact, avoided such argument (D47a). The Court, likewise, did not consider either Mr. Kaufman's affidavit submitted in the cause (D90a-10), but found that the defendants were neglectful and that such neglect was not excusable (D90a-28). It did not find Mr. Kaufman's conduct at fault (D84a, *et seq.*).

An appeal was taken to the New Jersey Superior Court, Appellate Division, which appeal affirmed the decision of the trial court. Again, the conduct of prior counsel was not argued or discussed. Subsequent appeal to the New Jersey Supreme Court for a Writ of Certification was denied. Neither the Appellate Division nor the New Jersey Supreme Court wrote an opinion.

The defendants were required to post Supersedeas Bond upon taking those appeals; upon taking this appeal, they have been required to add a further Supersedeas Bond to that already posted.

These inherent facts of the case, resulting in a default judgment by the working of procedural rules, bring about the question of due process. This argument was made to the New Jersey Supreme Court in the briefs filed by Warren, Chasan, Leyner and Holland, Esqs., on petition for certification. The New Jersey Supreme Court denied without opinion.

ARGUMENT

POINT I

The denial of the relief from the judgment rendered against the petitioners was violative of the Fourteenth Amendment denying the petitioners due process of law.

In the case at bar, the petitioners contend that their right to a day in court was denied arbitrarily and without due process. Taking the phrase at its basic meaning, the minimal requirements of "due process", "includes a reasonable notice of the nature of the proceedings and a fair opportunity to be heard therein". *Fantony* v. *Fantony,* 36 N. J. Super. 375, 115 A. 2d 610, 612, modified in 21 N. J. 525, 122 A. 2d 593 (1964).

Moreover it has been reiterated by the federal courts that the demands of due process required by the Fourteenth Amendment are such as accord with the traditional concepts of fair play, substantial justice, and a resolution on the merits of the case. *Murphy* v. *Helena Rubenstein Co., Inc.,* 234 F. Supp. 893 (D. C. N. J. 1964). In another New Jersey case, the Supreme Court of that state in discussing the adequacy of procedures in tax appeals, held that a litigant must be permitted to make an impressionable contact with the powers of decision. *Fifth Street Pier Corp.* v. *City of Hoboken,* 22 N. J. 326, 126 A. 2d 6, 12 (1964).

In the present case, there has been no "impressionable contact" between the petitioners and the courts. The petitioners have never been to court. Not one of them has ever heard the voice of a judge, nor has any judge looked upon their faces. Yet, some $25,000.00 is about to be taken from them and given to another, without due process of law. In order to obtain a valid judgment, the party seek-

ing it must grant his opponent an opportunity to be heard, or there is a denial of due process. *Chassis-Trak, Inc.* v. *Federated Purchaser, Inc.*, 179 F. Supp. 780 (D. C. N. J. 1960); *Lyons* v. *Goldstein*, 290 N. Y. 19, 47 N. E. 2d 425 (1943).

There can be no doubt that the defendants-petitioners case had merit. A cursory examination of the pleadings and affidavits indicate issues of fact (D1a; D7a; D34a; D41a; D60a). The price of bricks, the number of bricks, the amount of the balance owed, the terms of the agreement (it not having been in writing), all of these things put the defense on a par with the complaint so far as substance is concerned. Clearly, had a motion for summary judgment been made it would have been denied; and even more clearly, it was not made.

The question, then, is one of procedure and whether or not that procedure was offensive to the rules of fair play, reason, and sound discretion. If that procedure was offensive then there was a deprivation of due process of which the petitioners now complain.

The imposition of default judgment is the harshest of penalties which a litigant may suffer. Through it, the litigant is deprived of his voice, his defense. He literally never gets to tell his side of the basic disagreement between the parties. It is for this reason that the courts have been loathe to enter such judgments. For procedural offenses, many alternatives exist and are invariably provided by the rules of court short of default judgment. Fines, contempt citations, striking of parts of pleadings, suppression of parts of defenses, holding a debated fact as proved, and even incarceration, are all more likely to be used. N.J.R.R. 4:27-2. This is proper, because final default judgment is a drastic remedy on a par with the

lesson learned by an executed criminal. It is the end purpose of the courts in applying this principle that every case be tried on its merits; it is the courts purpose that only in the most extreme cases is a party to be deprived of his day in court and only if the conduct of that party does not warrant any forgiveness.

In that same spirit the courts have been receptive to applications to reopen final judgments granted on procedural grounds where no trial has been held. It has long been held, in New Jersey, that "... great liberality should be allowed in opening a judgment which went by default, and any reasonable grounds would be tolerated ..." See *Loranger, et al* v. *Alban, et al,* 22 N. J. Super. 336, 92 A. 2d 77 (1952), a case in which the defendant had appealed a default judgment entered for not filing an answer.

The federal court system has followed this line of thought, to the end that cases be tried on their merits. "Any doubt should be resolved in favor of the application to set aside the judgment to the end of securing a trial upon the merits." *Huntington Cab Co.* v. *American Fidelity and Casualty Co.,* 4 F. R. D. 496, 498 (1945). In fact the tone of the state and federal decisions in this entire area of the law has been that the sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply and its use must be tempered by judicial discretion to assure that its imposition is merited. *Huntington Cab Co.* v. *American Fidelity and Casualty Co., supra.*

The difference between arbitrariness and discretion is reason. Petitioners contend that the decision denying their application for relief was an abuse of discretion and, in fact, arbitrary as being without reason. There was no recognition by the lower court of any of the realities of the

case. The fact that the defendants failed to comprehend the language put forth in the interrogatories and the fact that they relied entirely upon their then attorney was held by the lower court to be inexcusable neglect. That decision is contrary to common experience; it is contrary to the weight of the law; and it is contrary to the liberality of thought and reason discussed above.

In *Coggin, et al* v. *Baufield,* 150 Fla. 551, 8 So. 2d 9 (1942), a default had been entered against the defendants for failure to plead. The court held that the matter of reopening a judgment is one of judicial discretion, and in the case of a reasonable doubt, where there has been no trial on the merits, this discretion should usually be exercised in favor of granting the application to get a determination on the merits. The court said, in part, "The defendant who is willing to have a trial should be permitted, when innocent of culpable negligence." The petitioners, herein, contend that the myriad of confusing facts in this case presented at least a reasonable doubt and that they were not guilty of "culpable negligence." Their biggest offense was in their failure to understand the questions presented to them, to understand the importance of the requirement to answer them and then to expand on those answers, and finally they failed to understand the grave consequences that would follow if they did not.

Yet the facts show that petitioners acted as reasonable men do. And the law shows that that is all that was required of them. *Jarrett* v. *Standard Diesel Engine Co.,* 124 N. J. L. 429, 12 A. 2d 671 (1940). They were sued for money. They had a defense. They went to a lawyer. The lawyer filed an answer and did the things, to their minds, that lawyers are supposed to do. As businessmen, caught up in their business problems, they did as businessmen do.

They left matters to their lawyer. What their lawyer did, and whether or not his conduct (or lack of it) is their responsibility or the courts (or just his own) will be dealt with in a later point. But so far as they are concerned, *they* did what was reasonably expected to be done by clients; and then awaited a day to come to trial and tell their story.

In the meantime, they supplied, in short memo form, answers to interrogatories that they understood they had to answer, leaving the details to their attorney. Notices of motion, orders compelling answers, orders striking defenses, notices to appear were all sent to their attorney. They expected that attorney to be responsive or to appear. It seemed reasonable that if he did not, that he knew what he was doing and did not have to. Certainly it was not for them to appear alone or on their own initiative.

Members of the Bar and Bench are familiar with the weight of responsibility a lawyer assumes when he takes a case. And conversely they are aware that a client's burden is diminished and his sense of responsibility mitigated when that lawyer *does* take his case. It was under this mitigated sense of responsibility that the petitioners awoke one day to learn that their bank account had been levied on. *They* were awaiting a trial date, and the plaintiff already had his judgment.

Still, the argument is well taken that says the procedures of court must be obeyed. A showing of bare impudence or lack of cooperation must bring the court's raw power to bear. The court must have the power to deal with triflers and impudents. No argument is here made that the lower court did not have the right to enter a default. But what it should have done was set such default aside when it was shown that the alleged triflers were really sincere if un-

knowing; that they who appeared to ignore orders did not even know of them. It is at this stage, the point where the question arises as to whether a default should be reopened that the level of indulgence should be lowered. To take a man's property, without hearing his defense, is no small thing. Before a court does so, it must be certain that the aggressiveness of plaintiffs' counsel, the ignorance of defendants, the conduct of defendants' counsel, the pressure of court calendars all are not conspiring to do a harm greater than the offense the court means to punish.

The standards for reopening such defaults are then, to be lessened in the face of a reasonable explanation. *Huntington Cab Co.* v. *American Fidelity and Casualty Co.*, 4 F.R.D. 496 (1945). The rule in New Jersey is that discretion shall be affirmatively used where there is "excusable neglect". R.R. 4:62-2(a). It would appear to be a paradoxical phrase. One word is inimicable to the other. But such is the intent of the rule: keep the power, like holding a big club, but wield it wisely with patience and understanding.

"Excusable neglect" refers to the conduct of the litigant, not of the attorney, and neglect of the attorney, though inexcusable may be cause for relief. *Reierson* v. *York*, 227 N. C. 575, 42 S. E. 2d 902 (1947). Moreover it was held in *Duenow, et al.* v. *Lindeman, et al.*, 223 Minn. 505, 27 N. W. 2d 421 (1947), that a litigant is not to be penalized for the neglect or mistakes of his attorney, and the court will relieve parties from the consequences when it can be done without prejudice to his adversary. (It should be pointed out that no possible prejudice can be done to the plaintiffs since supersedeas bonds have been posted to assure payment if in fact the plaintiff can win his case, on the merits, in open court.)

To conclude this point, it is well to point to Rule 37 of the Federal Rules of Civil Procedure, which deals with the question. The rule (and it is much like New Jersey's) was discussed in the case of *Cardox Corp.* v. *Olin Mathieson Corp.*, 23 F.R.D. 27 (D. C. Ill. 1958). It basically provides that if a party wilfully fails to serve answers to interrogatories after proper service of such interrogatories, the court may strike all or part of the pleadings of that party. But in the *Cardox* case, *supra*, the court held that "wilful failure" means any conscious and intentional failure to comply with the rule, and ". . . the rule should not be applied to situations in which certain of the answers be insufficient to satisfy the rule because they do not constitute full answers".

POINT II

The discrepancy between the penalties assessed against a plaintiff as against the same penalties assessed against a defendant for not complying with discovery procedures resulted in a denial of due process.

The Rules of Court of New Jersey, provide sanctions and penalties for non-compliance with discovery measures. They go from arm twisting to obliteration;

"4:27-2. FAILURE TO COMPLY WITH ORDER

(a) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court, the refusal may be considered a contempt of that court.

(b) *Other Consequences.* If a party or an officer, director or managing or authorized agent of a party fails to obey an order made under Rule 4:27-1 requiring him to answer designated questions, or an

order made under Rule 4:24-1 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rules 4:25-1 and 4:25-2 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the failure to obey as are just, and among others the following:

(1) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or entering a default against the party who fails to obey.

(4) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or an officer, director or managing or authorized agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

Note: Effective September 9, 1953; paragraph (b)(3) amended July 27, 1961 to be effective September 11, 1961. Formerly Rule 3:16-38, amended January 1, 1953.

What is peculiar about this rule is this: If one is a plaintiff and refuses to comply with discovery procedures, one's worse punishment will be a dismissal without prejudice. Such a plaintiff is free to start his suit again. The dismissal is never an adjudication preventing the suit from being heard again. The plaintiff will come to court another time. Aside from a reprimand, a delay and minimal expenses (possibly even including costs and counsel fees to his opponent) the plaintiff (Ah! what a benefit to be aggressive) lives to fight another day. *Burke* v. *Central Railroad Co. of New Jersey*, 42 N. J. Super. 387, 126 A. 2d 903 (1956). He is deprived of neither his chose-in-action, his injury nor his insult.

But, if one is a defendant, and if one is unfortunate enough to fall afoul of the discovery rules, then the penalty is conclusive and terrible. A judgment against a defendant is, by its very nature, the last rattle for him. He does not get to go to court some other day. He has had it; his property is forthwith given to another.

Such a distinction is not equal justice under the law. To have one's property taken in such a manner is a deprivation of due process of law. *Mitchell* v. *McDonald*, 114 Mont. 292, 136 P. 2d 536 (1943). The distinction should be abated, and only the United States Supreme Court can abate it.

In this case the New Jersey Supreme Court was asked to review its own rules. This is not consonant with reasonable expectation. However, it was so asked by a petition for writ of certification. This was denied without opinion. One can speculate that the New Jersey Supreme Court invoked its known rule that it will not review what it feels are the facts of a discretionary case. Yet, when such discretion is abused, due process is abused. The gravamen of such abuse is the dichotomy of a rule granting plaintiffs one justice and defendants another.

POINT III

A judgment should not have been entered against the defendants for procedural wrongdoing when the acts of their attorney constituted all or even part of the wrongdoing.

The attorney-client relationship is a principal-agency relationship. But it must be quickly pointed out that the attorney is a very special type of agent. Both his client and the public can expect and get a little more from him than other agents. *In re Boyle,* 18 N. J. 415, 113 A. 2d 818 (1955). It happens also that an attorney is the agent of the courts. In fact, he is an officer of the courts in which he is admitted to practice. The courts, too, expect and get a little more from him than from any other agent who comes to it. The relationships between court, client and attorney are fraught with responsibility. They call for the highest standards of care, conduct and duty. And what is more, these responsibilities run from one to all and from every to each. *In re Boyle, supra.*

It follows that when a lawyer's acts result, as here, in an extraordinary taking of defendants' property some responsibility falls upon the court. The court should have measured the attorneys' lack of diligence or worse, his negligence. Some examination should have been made of his conduct. And the court should have done this voluntarily, without argument of succeeding counsel. The court below should have known that counsel might not want to impugn his predecessor's conduct. This was peculiarly for the court to look upon and denounce. To blindly whitewash the conduct of the attorney who conducted the case was putting a weight on clients beyond their ability to carry. To disavow the responsibility for pointing out the attorney's actions, to award a judgment against his clients, to

avoid the responsibility a court has for its agent and officer was, in fact, a denial of due process. A judge who punishes a layman for the non-performance of the sophisticated acts required of a lawyer abuses the privilege he is given of extending understanding and discretion to the public. The following is a list of the acts or non-acts of counsel which the court was shown but which it chose to overlook:

(a) Defendants' attorney ordered depositions to be taken of the plaintiff and then did not appear to take them;

(b) Defendants' attorney ignored the fact that he requested depositions before interrogatories were served by the plaintiff, which gave him a priority of discovery. Had those depositions been pursued, he would have obviated the necessity of making answer to the interrogatories, which necessity was the basis for the appealed from judgment;

(c) Defendants' attorney, while noting that he wrote or telephoned to the defendants to get them to answer questions, indicated that his clients were in and out of his office but, he claimed, they never did have a conference at which the answers could be resolved (D54a);

(d) Defendants' attorney did not appear on the return day of five motions or other days in court, notices for which were given to him. The purpose of these court days varied from compelling interrogatories, compelling more specific answers to interrogatories (D24a, D25a and D27a), striking answers and counterclaim or taking proofs for entry of judgment (D30a);

(d) Defendants' attorney answered interrogatories inartfully by literally transcribing the notes of his clients, using minimal draftsmanship;

(e) Defendants' attorney failed to inform defendants of the return days for argument of items listed herein at paragraph (c). He claimed later that he got no notices yet attorney for the plaintiff attached copies of postal registration cards for such notices signed by the office staff of the defendants' attorney as being received by his office (D73a).

All of these things, the lower court heard as if they were regular modes of conduct of any lawyer. No particular significance was attached to them.

For a judge to ignore such conduct from an "Officer of the court" and cast the blame for such conduct on the client of such "officer of the Court" is to deny that client due process of law. (It might be pointed out that a possible action for negligence by the defendants against their former attorney will not allow their meritorious defense to be heard in the instant case, nor will it comfort them; for the plaintiffs are no more deserving of Mr. Kaufman's money than they are of the defendants).

In a similar situation, *Jarrett* v. *Standard Diesel Engine Co., Inc., et al., supra,* the defense of an action was turned over to an attorney. His answer to an amended complaint was filed late. The reason, the court found was the "carelessness and neglect" of the attorney. The defendant had, as in the case *sub judice,* a meritorious defense. The court there held that the defendant had done "as much as the average layman would do when he was originally served with the summons by taking it to his attorney and leaving the matter in his hands". The time for answering and filing, "were nothing which he should be charged with personally. He had reposed trust and confidence in his attorney to handle the matter according to law for him, and therefore, should not be penalized by being prevented from interposing a defense to the claim made against him because of such neglect and failure of diligence on the part of his counsel".

The court below found the petitioners' conduct deliberate (D91a). The petitioners contend that their conduct was reasonable. Again, in the *Jarrett* case, *supra*, the court continued: ". . . when it reasonably appears that such default judgment resulted solely from the neglect of the attorney of defendant to file an answer within time, and when injury or wrong has resulted or may result to a defendant therefrom, the judgment will be opened to permit proper pleadings to be filed".

Had reason been the guidepost of the lower court the decisional law in New Jersey would have demanded relief from the judgment. The *Jarrett* case, *supra*, was based in part on a then existing statute in New Jersey. The statute reaffirmed the basic common law principles. It reads (N.J.S.A. 2:27-115) as follows:

> "If, in any action judgment shall pass against either party by reason of the failure of the attorney of such party to file any proper pleading, the court or judge shall, on application within one year after the entry of such judgment, open such judgment and permit a proper pleading to be filed upon terms, if in the opinion of the court or judge, injury or wrong has resulted or may result from such failure."

The New Jersey Rule requiring only "excusable neglect" supplanted this statute. It is even more liberal. The New Jersey Supreme Court said of this rule that it must be applied "rationally and with fair recognition of the fact that justice to the litigants is always the polestar." *Alberti* v. *Civil Service Commission*, 41 N. J. 147, 195 A. 2d 297 (1963).

CONCLUSION

The petitioners have been denied relief from a default judgment entered against them. The entry of the default

was due largely to the alleged conduct of their attorney. The denial of the relief was contrary to the abundance of cases in New Jersey and the federal arena. The *Jarrett, Huntington* and *Coggin* cases were direct and clear in this matter. There is no question but that the judgment should have been opened. The failure to do so was error.

The court below should have considered that there was a question of the attorneys' conduct and should have taken the initiative to look into the matter since it was known to the court that the petitioners could not have done it while defending this action. There has been no indication by the court that it even considered the matter. The cases cited indicate a necessity of liberality of thought and equitable principles in imputing an attorney's conduct to his client.

The petitioners did no more than what should have been expected from any other defendant in a similar situation. They acted reasonably and prudently. This decision penalized them for so acting.

The petitioners have been denied a fair and reasonable opportunity to be heard, thus being denied the due processes of the law guaranteed them under the Fourteenth Amendment of the Constitution of the United States.

No intrusion on *stare decisis* is contemplated if the court were to grant this application for writ of certiorari. The cases, in fact, support the position of the petitioners. A basic holding is now required which would remove a glaring unfairness and apparent compromise of such a valued and venerated right as the right to due process of law.

Wherefore, the petitioners pray that a writ of certiorari be granted, enabling this court to review the judgment below to the end result that the order heretofore entered by the Superior Court of New Jersey, denying relief from the default judgment be reversed, and that the affirmance of such denial by the Appellate Division of the Superior Court be reversed, and that the default judgment be vacated upon such terms as are just and that there should be a trial on the merits.

Respectfully submitted,

RUDD, ACKERMAN & BREITKOPF,
Attorneys for Petitioners.

BERNARD RUDD,
MICHAEL BREITKOPF,
Of Counsel.

APPENDIX A

Opinion of Appellate Division

Argued February 21, 1966—Decided March 4, 1966.

Before: Judges CONFORD, KILKENNY and LEONARD.

MR. LEWIS M. HOLLAND argued the cause for Defendants-Appellants (MESSRS. WARREN, CHASAN, LEYNER & HOLLAND, attorneys).

MR. DANIEL CRYSTAL argued the cause for Plaintiffs-Respondents (MESSRS. DAVID & ALBERT L. COHN, attorneys).

PER CURIAM.

Judgment affirmed.

APPENDIX B

Order Denying Petition

SUPREME COURT OF NEW JERSEY

SAL LIMANDRI, *et al.*,

Plaintiffs-Respondents,

vs.

MILTON LEVY, *et al.*,

Defendants-Petitioners.

ORDER DENYING PETITION

APPELLATE DIVISION, SUPERIOR COURT:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 17th day of May, 1966.

JOHN H. GILDEA,
Clerk of the Supreme Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1966

No. 405

MILTON LEVY, MEYER GOLD and GELT CONSTRUCTION CO., INC., a corporation of the State of New Jersey,

Petitioners,

vs.

SAL LIMANDRI and LIM-LOW CONSTRUCTION CO., INC., a corporation of the State of New Jersey,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF AND APPENDIX FOR PLAINTIFFS-RESPONDENTS IN OPPOSITION

DAVID COHN,
Attorney for Respondents,
152 Market Street,
Paterson, New Jersey.

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Opinions Below

The Superior Court of New Jersey, Law Division, in two separate oral opinions held that the defendants (petitioners) had failed to show excusable neglect justifying the vacation of a default judgment entered against them for their deliberate failure to comply with prior orders to answer interrogatories more fully. These opinions are reproduced in our Appendix in view of the petitioners' failure to include them in the Appendix to their Petition pursuant to Supreme Court Rule 23 (j) requiring that there be appended to the Petition a copy of the judgment or decree of the state court as to which review is sought. The opinions of the two state appellate courts are without explication without these trial court opinions.

The Appellate Division of the Superior Court of New Jersey unanimously affirmed the default judgment below (Pet., App. A). It did not set forth its reasoning. (A directive from the Supreme Court of New Jersey had earlier provided that all cases argued before the Appellate Division after January 1, 1966, were to be decided without a written opinion except where extraordinary circumstances required some comment (89 N. J. L. J. 1).)

The opinion of the Supreme Court of New Jersey (Pet. App. B) unanimously denying certification with costs appears at 47 N. J. 243, 220 A. 2d 115 (1966).

Jurisdiction

Respondents vigorously deny that there are sufficient grounds here for jurisdiction under 28 U. S. C., Sec. 1257 (3). The Petition involves only the question whether the state courts of New Jersey, dealing with a state procedural rule, properly determined that the trial court exercised its discretionary powers under that rule. This does not pre-

sent either a federal or a constitutional question. *Murdock* v. *Memphis,* 20 Wall. 590, 636 (1875); *Berea College* v. *Kentucky,* 211 U. S. 45, 53 (1908); *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210-211 (1935). Moreover, no purported constitutional grounds were raised at all in the Appellate Division. "An order of a court of last resort declining to review a case is not ordinarily the judgment which is reviewable under § 1257; in that event the reviewable judgment is that of the highest court possessing and exercising jurisdiction." Stern and Gressman, *Supreme Court Practice* 89; Sec. 3-23 (BNA Inc., 3rd ed. 1962).

Counter-Statement of Questions Presented

The purported constitutional issue of denial of due process of law amounts to no more than the assertion, totally unsupported by the record, that each state court which considered this record abused its discretionary powers in evaluating the facts of this case. No less than twelve of the most experienced judges in New Jersey have unanimously found no merit in the defendants' contention that the default judgment should be vacated. These contentions have been rejected by the trial judge who entered the default, the Assignment Judge of Passaic County who granted the default judgment after taking proofs in open court, three members of the Appellate Division, and seven members of the Supreme Court. The constitutional arguments advanced by the defendants amount to no more than the "shibboleth mouthing of constitutional phrases like 'due process of law' and 'equal protection of the laws'" criticized by the Supreme Court of New Jersey in *Tidewater Oil Co.* v. *Mayor and Council of Carteret,* 44 N. J. 338, 342, 209 A. 2d 105, 107 (1965).

The only questions which the Petition presents are as follows:

1. Should this Court grant certiorari to consider the issue of the negligence of defendants' trial attorney when the defendants concede that they never advanced such issue before any of the state courts?

2. Is it a denial of due process of law for a state court to exercise its discretionary power to enter a default judgment pursuant to the state counterpart of Federal Rule of Civil Procedure 37, and to decline subsequently to vacate this default judgment, where the state court finds on a careful review of the facts that the failure of the defendants to comply with repeated discovery orders was willful and deliberate and did not constitute excusable neglect?

3. Should certiorari be granted because of a supposed discrepancy between the penalties assessed against a plaintiff and those assessed against a defendant for not complying with discovery procedures where such "discrepancy" simply does not exist either in fact or in law as is made clear by a state rule of court and by prior decisions of this Court and of other appellate courts?

4. Are not parties bound by the negligent acts of their attorneys in the prosecution of a case, particularly where their own willful, deliberate, and inexcusable neglect of valid discovery orders conjoins with the negligence of their attorneys to defeat meaningful discovery in the case?

Counter-Statement of the Case

The defendants' Statement of the Case contains so many significant misstatements and omissions as to the record herein that we deem it appropriate to state in some detail what actually transpired, as found by the trial court and affirmed by the Appellate Division. When viewed in the context of this record, it will readily be apparent that the questions raised by the petition are patently without merit, and present no basis whatsoever for review by this Court.

In their Statement (Pet. pp. 3-5) defendants adroitly seek to exculpate themselves from their own inexcusable neglect of repeated discovery orders by alleging that the negligence was not theirs, but instead that of their original attorney, William Kaufman, Esq. Significantly, however, they admit that after they were served with interrogatories by plaintiffs' counsel, they "received notice that they should supply answers, by several letters and some telephone calls from Mr. Kaufman" (Pet. pp. 3 to 4; D39a-15 to 20). They contend nevertheless that "the questions were not fully understood by the defendants'" and that, "No personal conferences were held, however, in spite of the fact that the defendants were in and out of the office of Mr. Kaufman" (Pet. p. 4). They appear somehow to believe this provides a reason why this Court should grant certiorari, rather than being a blatant admission of their own inexcusable and knowing neglect of court orders requiring meaningful discovery.

The complaint here charged that defendants had failed to make payment in full to the plaintiffs for labor and materials furnished in connection with the laying of bricks in erecting garden apartments (D1a to D4a). A judgment in the amount of $23,047 has been entered in this matter following the taking of proofs showing that the total amount due under the contract was $104,247 and that plaintiffs had been paid only $81,200, leaving the $23,047 still due and owing (D31a).

As the trial court noted, "these defendants are not babes in the woods," but are instead "competent business people." (P67a-5 to 6).* The explanation which their trial

* Reference is made to the Appendix which the plaintiffs were required to furnish the Appellate Division because of the incompleteness of the record furnished that court by defendants. See also PR9a (referring to Appendix B, annexed herein, and designated as PR—a (Plaintiffs-Respondents' Appendix)).

attorney, Mr. Kaufman, offered by affidavit for their indifference to the court's repeated discovery orders hardly affords any persuasive reason why this Court should interfere with the State courts' exercise of their discretionary powers in this case (D55a-20 to 26):

> "Mr. Levy and Mr. Gold were in the process, and I understand are still in the process, of dividing and splitting up their many and complex business interests, and their pre-occupation with these problems may, and I believe did, affect their dedication to the discovery in this suit, despite my repeated warnings and requests."

After discussing the facts of the case thoroughly with the defendants (D53a-12 to 25), Mr. Kaufman filed an answer and counterclaim on their behalf (D5a to D8a). The counterclaim charged that the individual plaintiff, Sal Limandri, had entered into a joint venture with the corporate defendant, Gelt Construction Co., for masonry work to be furnished in the erection of other garden apartments (D7a-9 to 30). It was claimed that Limandri breached this alleged agreement by contracting directly with the owner-builder, and that Gelt had accordingly been damaged in the very precise amount of $53,400 (D7a-35 to D8a-5 to 7).

Discovery then commenced on both sides.

Defendants, through Mr. Kaufman, served notice to take oral depositions of Mr. Limandri on February 19, 1964 (D53a-30). The parties agreed upon a time and place for the taking of these depositions (P5a; P6a; D53a-33). Mr. Limandri appeared ready to be deposed, but Mr. Kaufman failed to appear to depose him (D79a-4 to 7). His failure to appear or to pursue these depositions is now urged as a reason why this Court should grant certiorari on the premise that the New Jersey courts denied defend-

ants due process of law by failing to raise the issue of his negligence on their own initiative! (Pet., pp. 15 to 18).

Plaintiffs relied for their discovery entirely upon interrogatories. Their counsel, on March 6, 1964, served interrogatories directed both to the defense and to the claimed joint venture (D12a to D18a). The frustration of their attempts to get discovery from the defendants has been so complete that meaningful answers to some of these interrogatories have not been received even to this date.

The chronology of their unsuccessful efforts in this regard is set forth fully in the trial court's careful review of the record in its first oral opinion declining to vacate the default judgment (D84a to D92a; App. A herein).

When the answers to interrogatories were not forthcoming in a reasonable time (D54a-6), a motion was served, returnable April 17, 1964, requiring the answers (D9a; P2a). On the return date, the trial court ordered that the interrogatories be answered within 30 days, or the answer would be stricken on notice. (The ordinary interrogatory order in New Jersey was then for 20 days.) (D10a) The interrogatories were not answered within the time permitted by such liberal order of court (D68a-2 to 10).

A second motion to compel answers was then served on May 27, 1964, returnable June 5, 1964 (D11a). Incomplete answers were received by counsel for plaintiffs at his home the night before the adjourned date of such second motion. (D68a-8 to 10; P28a-18 to 20).

The answers received were palpably insufficient. The answer given to Interrogatory No. 24 is illustrative (D17a-12 to 22; D23a-9 to 18):

> "24. State in full and complete detail a computation of the work done by Limandri and/or Lim-Low

Construction for the first group of buildings referred to in the counterclaim including (a) number of buildings, (b) nature of work done (c) type of brick used (d) number of brick involved (e) labor expense (f) cost of brick (g) cost of material (h) net profit (i) gross profit.

"Ans. (a) not presently available—to be furnished. (b) not presently available—to be furnished. (c) not presently available—to be furnished. (d) not presently available—to be furnished. (e) not presently available—to be furnished. (f) not presently available—to be furnished. (g) not presently available—to be furnished. (h) not presently available—to be furnished. (i) not presently available—to be furnished."

It will be noted that the counterclaim had alleged lost profits in the most precise amount of $53,400 (D8a-7 to 10). The evasive nature of the answers to interrogatories is well illustrated by the contrast between this specificity and the answer to Interrogatory No. 23:

"23. What profits did the defendant Gelt make on the first group of buildings indicating (a) gross profit (b) net profit?" (D17a-9 to 10).

"A. Cannot be determined, since overhead and office allocation will not permit." (D23a-5 to 6)

Similar meaningless answers (or no answers) were given, *inter alia,* to Interrogatories Nos. 1 (c) (D19a-5); No. 7 (as to how many bricks were installed at the construction site (D13a-35 to D14a-10; D19a-35 to D20a-39)); No. 8 (D14a-15 to 20; D21a-5 to 10); No. 21 (D16a-35 to 36; D22a-39); and No. 22 (D17a-1 to 2; D23a-1). These incomplete answers dealt with both the answer and the counterclaim.

In view of the clear insufficiency of these answers, plaintiffs filed their third discovery motion (D24a) to compel more specific answers. Notice of this motion was sent to defendants' attorneys by certified mail, return receipt requested, and service was acknowledged by such firm on July 1, 1964 (P3a).

Nevertheless, no one appeared on behalf of the defendants on the return day of the motion, July 9, 1964 (D25a-7 to 10; D86a-21 to 25). The trial court thereupon entered an order requiring them to answer the interrogatories specifically within 20 days "failing which, the plaintiffs may move, *upon notice* to strike the answer and appearance and proceed by default with the taking of proofs and the entry of judgment" (D25a-25 to 30). This procedure was in full accord with the applicable state rule of procedure, New Jersey Revised Rule 4:[illegible]2 (b) (3) (quoted at Pet., p. 13).

A copy of this order of July 9, 1964, was immediately sent to defendants' attorneys (D68a-14 to 20). The order has never been complied with.

Since plaintiffs were still balked in obtaining meaningful discovery, despite three prior motions (D9a; D11a; D24a), and two prior orders of the court (D10a; D25a), a fourth motion was filed on August 12, 1964, expressly putting defendants on notice that plaintiffs were moving to strike the answer for failure to comply with the order of July 9, 1964 (D26a). Again, notice of such motion was sent to the defendants' attorneys by certified mail, return receipt requested. Again, their attorney acknowledged service of such notice of motion (P4a).

The latter fourth motion came before the trial court on August 20, 1964. Once again, the motion was ignored by defendants and their counsel. The court thereupon signed the third discovery order requiring that "the defendants Levy, Gold, and Gelt Construction Co. answer in due form

more specific Interrogatories heretofore served within 20 days from the date hereof and in accordance with an Order dated July 9, 1964; failing which their answer and appearance will be stricken without notice, and the plaintiffs be permitted to proceed by default with the taking of proofs and the entry of judgment" (P1a). (Defendants' appendix fails to reproduce this crucial order, relying on the unconvincing statement that "This Order could not be secured for printing" (D27a). It is summarized (entirely erroneously) as merely "a second order directing the defendants to give more specific answers to interrogatories" (*Ibid.*)).*

This third discovery order was, in turn, sent on August 20, 1964, to the attorneys for the defendants (D68a-27 to 33). It too was ignored. Plaintiffs so advised the court (D28a). The trial court, in full accordance with the express provisions of the order of August 20, 1964, signed an Order on September 23, 1964, striking the answer, appearance, and counterclaim of the defendants, and ordering that default be entered, and that a date be set down for the taking of proofs and entry of a default judgment (D9a; D87a-20 to 22).

Thereafter, on October 5, 1964, notice of taking proofs for the entry of judgment was duly served upon defendants' attorney by certified mail, return receipt requested (D30a). Receipt thereof was acknowledged (D73a). This notice too was ignored.

On October 14, 1964, proofs were taken in open court before the Assignment Judge of Passaic County, Honorable

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* Plaintiffs were accordingly impelled to submit a Supplementary Appendix to the Appellate Division containing this crucial order, and other parts of the record essential to full consideration of the case. Petitioners have not supplied this Court with this Supplementary Appendix. We have filed it with the Honorable Court as part of the certified record.

Harold Kolovsky, who questioned Mr. Limandri closely as to the factual basis for his claim. On October 19, 1964, Judge Kolovsky entered an order for judgment in the sum of $23,047 (D31a to D32a). This order of judgment was served upon the defendants' counsel (D69a-22 to 39; P29a-7 to 10), but again without response. Defendants have acknowledged that on November 6, 1964, their then counsel received a letter from the Clerk of the Superior Court advising that the judgment had been entered (D56a-7 to 11). Even then no action whatsoever was taken either by defendants or by their attorneys on their behalf (D69a-30 to 40).

It was not until levy of execution was made in December 1964 upon a bank account of the defendants, and they finally concluded that they could no longer ignore the court's process, that they took belated action (P30a-20 to 25; D88a-28).

Through substituted counsel, they then moved (by order to show cause) to vacate the default judgment (D49a to D50a). In support of this order to show cause, they filed identical affidavits alleging for the first time that they were unaware that their former attorney had pleaded a counterclaim based on a relationship of joint venture (D37a-8 to 30; D44a-6 to 20). Each affidavit advanced the novel request that, "If permitted to defend this action, we will withdraw the claim of joint venture asserted in the counterclaim" (D37a-28 to 30; D44a-28 to 30). They claimed that they were unable to answer these interrogatories specifically because they dealt with the question of "joint venture" (D37a-30 to D38a-11; D44a-31 to D45a-15). Their own attorney, Mr. Kaufman, however, averred that he had repeatedly warned them to answer the interrogatories more specifically, and had warned them that their suit might be lost if they failed (D54a-12 to 15). He attempted with-

out success to get them to confer with him on the answers (D54a-20 to 28). Defendant Levy admits that he had "several letters from William Kaufman, Esq., requesting that the 'blank spaces' in my answers be filled in" (D39a-15 to 16).

The trial court clearly had the right on the record to conclude, as trier of the fact, that this belated claim of ignorance as to the claim of "joint venture" (D37a-15) simply was not true. Three of the interrogatories expressly contain the phrase "joint venture", *i.e.*, Interrogatory No. 12 (D15a-12); No. 15 (D15a-35); and No. 18 (D16a-25). Defendants could not possibly have answered them without knowing that "joint venture" was in the case. If they had any questions as to this term, their attorney was not only readily available; he was forcefully requesting them to confer with him on the answers (D54a-21).

Such was the record of knowing indifference to court orders that the trial court considered (D84a to D91a; App. A herein). This record illustrates the disingenuous nature of the contention in the Petition that the defendants "did what was reasonably expected to be done by clients" (Pet., p. 10). In the trial court's words (D90a-25 to D91a-22; App. A herein, PR6a to PR7a):

> "This Court is of the opinion that there was neglect on the part of the defendants, but is not convinced that that neglect was such excusable neglect as would cause this Court to set aside the default judgment. The individual defendants themselves admit in their affidavits that they had been requested by their own attorney and by the language employed in the affidavits this Court would believe that they were requested more than once to complete the answers to their interrogatories. The constant failure to comply with the court rules is evident by the

chronology that the Court has set forth above, and it would appear to this Court that the failure or neglect to comply with the various orders of the court and the rules of court were not such neglect as should be excused.

"There is no question but what all courts should attempt to decide matters to do substantial justice to all parties. However, the very purpose in the Supreme Court promulgating rules is that they should be complied with. And while some latitude should be shown where there is a reason to extend time, I find nothing in this case which would indicate that any application had ever been made to this Court or any other judge sitting for an extension of time, and I am of the opinion, from a review of the file, that the neglect was deliberate and must not be sanctioned."

The Court noted that it was purposely not passing upon the allegation that a meritorious defense was claimed since "the first step to be shown is that there was excusable neglect" (D91a-22 to 25; App. A herein, PR7a).

Petitioners misstate the record significantly by claiming, "The Court, likewise, did not consider either Mr. Kaufman's affidavit submitted in the cause" (Pet., p. 5). They fail to advise this Court that they thereafter (on March 5, 1965) reargued the motion for vacation of the default (D52a), relying upon an affidavit by Mr. Kaufman belatedly submitted by them (D53a to D56a).* After hearing extensive argument (P51a to P72a), the trial court concluded (P65a-4 to 16; PR8a):

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* The full transcript of the reargument is set forth in the Appendix we submitted to the Appellate Division (P51a to P72a).

"Now, if someone sues a defendant for $23,000 or more and the defendant himself isn't interested enough to protect himself and wilfully neglects to defend himself and allows the plaintiff to enter such judgment I don't think that this is a travesty on justice. He has received exactly what he has asked for and that's my opinion of what took place here.

"Now, I see nothing in Mr. Kaufman's affidavit nor nothing in your application here which would change my mind one bit from the decision I made some several weeks ago."

Its orders refusing to vacate the default judgment (D80a; D81a) were unanimously affirmed on appeal by the Appellate Division (Pet., App. A, p. 21). Defendants advanced no constitutional arguments whatsoever before the Appellate Division.

The Supreme Court of New Jersey unanimously denied certification despite the invocation by defendants for the first time of alleged constitutional arguments. The claim was there made that the severity of the sanction was essentially punitive and, therefore, a denial of due process and unconstitutional (Pet. for Certification).* It was contended, "Thus, even what amounts to the deliberate contempt of a court's order should not preclude a determination on the merits" (Pet. for Certification, pp. 10-11).

Neither in the Appellate Division nor in the Supreme Court did the defendants argue that due process of law was denied them in any way as a result of the negligence of Mr. Kaufman.

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* Copies of the defendants' Petition for Certification to the Supreme Court of New Jersey and of the plaintiffs' Answer thereto have been filed by plaintiffs with the Clerk of the Honorable Court as part of the Record before this Court.

ARGUMENT

POINT I

No constitutional or federal question is properly presented here giving this Court jurisdiction or justifying grant of certiorari.

It is entirely misleading for Petitioners to advise this Court that the argument as to due process was made to the New Jersey Supreme Court in the brief filed by Warren, Chasan, Leyner, and Holland, Esqs., on petition for certification (Pet., p. 5). There is impermissible legal sleight of hand here. The argument as to alleged denial of due process of law made in the Supreme Court of New Jersey was that New Jersey Revised Rule 4:27-2 (b) (quoted at Pet., pp. 12-13) "may not be used to punish for contempt" (Pet. for Certification to Supreme Court of New Jersey, p. 15). That argument has been abandoned before this Court.

The basic argument of the Petition here is quite different. *Cf. Dewey* v. *Des Moines,* 173 U. S. 193, 197-198 (1899). Petitioners now shift their claim to the contention that they were denied due process of law because the trial court and the appellate courts of New Jersey failed to give proper weight to the negligence of their own trial attorney (Pet., pp. 9-11; 15-19). This argument permeates the first and third points of the Petition.

Wholly apart from the fact that it is settled law that litigants are bound by the acts of their attorneys (see our Point IV, *infra*), petitioners in any event admit that they did not raise this issue in the state courts (Pet., pp. 5, 15, 19). Thus, they state with respect to their appeal to the Appellate Division "Again, the conduct of prior counsel

was not argued or discussed" (Pet., p. 5). Their Petition for Certification to the New Jersey Supreme Court is similarly silent on this issue.

The claimed constitutional question allegedly arising from the conduct of their trial attorney has accordingly not been properly raised in the state courts. *Whitney* v. *California*, 274 U. S. 357, 362-363 (1927); *Wilson* v. *Cook*, 327 U. S. 474, 483-484 (1946); *Adler* v. *Board of Education*, 342 U. S. 485, 496 (1952); *State Farm Mutual Ins. Co.* v. *Duel*, 324 U. S. 154, 160-161 (1945), rehearing denied, 324 U. S. 887 (1945).

Petitioners are precluded from urging before this Court for the first time a claimed federal issue that was not raised by them below. See *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Asso.*, 360 U. S. 334, 342, n. 7 (1959); *Whitney* v. *California, supra*, 274 U. S. at 362-363. As this Court stated in *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317 (1937):

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented. (Citing cases.)"

This Court has held that it is without jurisdiction unless the state courts passed upon the question of constitutionality sought to be raised in this Court. *Bailey* v. *Anderson*, 326 U. S. 203, 208 (1945). See also, *Jacobi* v. *Alabama*, 187 U. S. 133, 135 (1902); *Mutual L. Ins. Co.* v. *McGrew*, 188 U. S. 291, 309 (1903).

To entertain jurisdiction of alleged constitutional issues raised for the first time in this Court would be to have this Court assume original jurisdiction of issues that petitioners never asked the state courts to pass upon. This would be directly at odds with the jurisdiction conferred upon this Court by the Constitution. Constitution of the United States, U.S.C.A., Art. 3, Sec. 2, Clause 2. Clearly, there can be no appellate jurisdiction under such clause of the Constitution where the issue has not been considered by the state courts whose judgment is sought to be reviewed. *Ibid.*

Nothing is involved here other than an attempt to have this Court overrule the highest courts of New Jersey in their consideration of discretionary powers granted a trial court under state rules of civil procedure. As to these issues, the judgment of the highest state court is conclusive. *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 477 (1937). See also, *Standard Oil Co.* v. *State of N. J. by Parsons,* 341 U. S. 428, 433 (n. 2) (1951).

Moreover, the record here shows plainly that the trial court was justified in concluding that petitioners by their own conduct had failed to show excusable neglect for their failure to comply with the court's repeated discovery orders. Its disbelief of their unconvincing explanations for such neglect (D90a-25 to D91a-21; App. A herein) is merely an evaluation of credibility by a state court. This Court does not reexamine a state court's findings and conclusions of fact. *Fry Roofing Co.* v. *Wood,* 344 U. S. 157, 160 (1953).

The refusal to vacate the default judgment accordingly rests upon an adequate and independent non-federal ground. This Court will not grant certiorari under such circumstances. *Murdock* v. *Memphis, supra; Berea College*

v. *Kentucky, supra; Fox Film Corp.* v. *Muller, supra.* "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn,* 324 U. S. 117, 125-126 (1945).

POINT II

Entry of a default judgment and subsequent refusal to vacate such judgment for petitioners' wilful and knowing refusal to comply with proper discovery orders is fully consonant with due process of law.

We have set forth in rather complete detail above how the defendants thwarted meaningful discovery here.

Defendants gloss over this flagrant record of gross indifference to court orders and inexcusable neglect. They claim, entirely contrary to the real facts, that there has been no "impressionable contact" between themselves and the courts merely because, "Not one of them has ever heard the voice of a judge, nor has any judge looked upon their faces" (Pet., p. 6). They who willfully ignored the repeated warnings from their own attorney (D54a-5 to 28) ask this Court to grant certiorari on the lame contention that "their right to a day in court was denied arbitrarily and without due process." *Ibid.* Their purported constitutional issue of denial of due process resolves itself ulti-

mately into the quite fantastic argument that, regardless of a party's recalcitrance toward court orders, or the inexcusable neglect of such orders both by the litigant and by his attorney, the offender is nevertheless immune from ultimate sanctions and must be excused and given a trial on the alleged merits of his case (Pet., pp. 7-12). The argument is patently sham and affords no justification for grant of certiorari by the Court.

A. Grant of a Default Judgment Was Proper Here.

Significantly, the defendants make clear they concede the right of the trial court to grant a default judgment. They expressly state, "No argument is here made that the lower court did not have the right to enter a default" (Pet., p. 10). Their claim of denial of due process is instead premised on the argument that "the decision denying their application for relief was an abuse of discretion and, in fact, arbitrary as being without reason" (Pet., p. 8).

The validity of this argument can be appraised properly only by analysis of the extent of the trial court's discretionary powers under the state rule permitting sanctions for failure to comply with discovery orders.

Such power of the trial court is derived from the explicit language of New Jersey Revised Rule 4:27-2 (Pet., pp. 12-13). The rule is derived from, and virtually a verbatim adoption of, the counterpart Federal Rule of Civil Procedure 37, U.S.C.A. The Supreme Court of New Jersey emphasized in *Lang* v. *Morgan's Home Equipment Corp.*, 6 N. J. 333, 338-339, 78 A. 2d 705, 707 (1951) that "sanctions are peculiarly necessary in matters of discovery" and that, "The consequences attendant upon the failure to make discovery when ordered are provided by Rule 3:37 [now R.R. 4:27-2] and the trial court is free to apply them, subject only to the requirement that they be just and reasonable in the circumstances."

In *Lang, supra,* the highest state court in New Jersey, construing its own rules, set forth the guide lines for determining when entry of a default judgment is just and reasonable. It affirmed imposition of the sanction of dismissal of a defendant's counterclaim where the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious (78 A. 2d at 708). Both these standards justified entry of a default judgment here. The trial court so held (D90a-25 to D91a-4; Appendix A herein). Moreover, in *Lang, supra,* the Supreme Court added (78 A. 2d at 708):

> "Where the circumstances are less aggravated, the court should give the offending party another opportunity at a short day to comply with the order. * * * The offending party would then have the alternative either of complying promptly or of refusing and suffering the consequences. Since the court below expressly stated that the defendant's conduct was not contumacious, we are inclined to the view that the penalty imposed was more severe than necessary and that a further opportunity to comply should have been granted before suppressing its counterclaim."

Both the plaintiffs and the trial court here followed precisely this procedure. The defendants were given opportunity after opportunity to comply with the court's discovery orders. No court would, or should, tolerate the willful disobedience to discovery orders shown by this record. To tolerate it would be to open the floodgates to procedural chaos and intolerable flouting of court orders. No abuse of discretionary powers justifying review by this Court exists here.

The *Lang* case, *supra*, clearly superseded *Jarrett* v. *Standard Diesel Engine Co., Inc.*, 124 N. J. L. 429, 12 A. 2d 671 (Sup. Ct., N. J. 1940), a decision by what was then an intermediate appellate court in New Jersey. Defendants rely heavily on this case (Pet., pp. 9, 17-19).

Entry of default judgments under records of inexcusable neglect paralleling that in the instant case has been affirmed by the New Jersey appellate courts, as both constitutional and as within the trial court's discretionary powers. *Interchemical Corp.* v. *Uncas Printing & Fin. Co., Inc.*, 39 N. J. Super. 318, 324-325, 120 A. 2d 880, 884 (App. Div. 1956); *Merck & Co., Inc.* v. *Biorganic Laboratories, Inc.*, 82 N. J. Super. 86, 91, 196 A. 2d 688, 691 (App. Div. 1964).

No new constitutional issues are presented here as to the power of a trial court to apply sanctions for failure to comply with discovery orders. The Court carefully analyzed these issues in *Societe Internationale* v. *Rogers*, 357 U. S. 197, 206-208 (1958) in considering the counterpart Federal Rule, Fed. R. Civ. P. 37 (b). "For purposes of subdivision (b) (2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with the order." *Ibid.*

This Court dealt with a parallel factual situation in *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602 (2d Cir. 1964), certiorari granted, 379 U. S. 912 (1964), certiorari dismissed, 380 U. S. 248, 249 (1965). The Court there dismissed as "improvidently granted" the writ of certiorari it had previously granted (380 U. S. at 248, 249). The Second Circuit Court of Appeals had held there (332 F. 2d at 614):

> "When Hughes chose not to appear for this deposition—which action was taken deliberately and with

full knowledge of the sanctions available to the additional defendants under Rule 37, Judge Metzner was fully justified in entering judgments dismissing the counterclaim against TWA and the additional defendants. The sanction of judgment by default is the most severe sanction which the court may apply and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed (citing cases)."

Dismissal of an action for willful failure to comply with discovery orders of the court does not violate due process of law. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 349-354 (1909); *Societe Internationale* v. *Rogers, supra,* 357 U. S. at 209-211; *Nasser* v. *Isthmian Lines,* 331 F. 2d 124, 129 (2d Cir. 1964). See also, *Link* v. *Wabash Railroad Co.,* 370 U. S. 626, 629-633 (1962); *Costello* v. *United States,* 365 U. S. 265, 285-287 (1961). Due process is secured by the valid presumption of fact created by the law-making power that the refusal to produce material evidence is but an admission of the want of merit in the asserted claim or defense. *Hammond Packing Co.* v. *Arkansas, supra,* 212 U. S. at 350-351; *Societe Internationale* v. *Rogers, supra,* 357 U. S. at 209-210; *Nasser* v. *Isthmian Lines, supra.*

In entering a default judgment here, the trial court was accordingly following settled principles of law. The Court has repeatedly denied certiorari under these circumstances. See, *e.g., First Iowa Hydro Elec. Cooperative* v. *Iowa-Illinois Gas & Elec. Co.,* 245 F. 2d 613, 628 (8th Cir. 1957),

cert. denied, 355 U. S. 871 (1957), pet. for rehearing denied, 355 U. S. 921 (1958); *Peitzman* v. *City of Illmo*, 141 F. 2d 956, 960-961 (8th Cir. 1944), cert. denied, 323 U. S. 718 (1944), pet. for rehearing denied, 323 U. S. 813 (1944); *Collins* v. *Wayland*, 139 F. 2d 677, 678 (9th Cir. 1944), cert. denied, 322 U. S. 744 (1944); *Von Der Heydt* v. *Kennedy*, 299 F. 2d 459, 462-463, 112 App. D. C. 78 (App. D. C. 1962), cert. denied, 370 U. S. 916 (1962). See also, *Bourgeois* v. *El Paso Natural Gas Co.*, 257 F. 2d 807 (2d Cir. 1958). Petitioners place their reliance instead upon a decision by a federal district court, which applied its discretionary powers to the facts before it, *Huntington Cab Co.* v. *American Fidelity and Casualty Co.*, 4 F. R. D. 496, 498 (D. C. S. D. W. Va. 1945) (Pet., pp. 8, 11).

Imposition of sanctions for failure to comply with orders for more specific answers to interrogatories is well within a trial court's discretionary powers. See, *e.g.*, *Michigan Window Cleaning Co.* v. *Martino*, 173 F. 2d 466, 468 (6th Cir. 1949) (approvingly cited by the Supreme Court of New Jersey in *Lang* v. *Morgan's Home Equipment Corp.*, *supra*, 78 A. 2d at 708); *Kurt M. Jachman Co.* v. *Marine Office of America*, 17 F. R. D. 41 (D. C. S. D. N. Y. 1955). *Cardox Corp.* v. *Olin Mathieson Corp.*, 23 F R. D. 27 (D. C. Ill. 1958) (Pet., p. 12) is only an instance where a federal district court concluded otherwise in its discretion.

In the *Lang* case, *supra*, 78 A. 2d at 708, the Supreme Court of New Jersey, construing its own state rule, made it clear that a litigant who failed to comply with a second order to answer interrogatories more specifically thereby elected to take the consequences of imposition of ultimate sanctions. Its judgment is conclusive as to the construction and application of the state rule involved herein, New Jersey Revised Rule 4:27-2. *Senn* v. *Tile Layers Protective Union*, *supra*, 301 U. S. at 477.

B. The Trial Court Acted Properly Within Its Discretionary Powers In Declining to Vacate the Default Judgment.

Defendants do not even challenge the settled authority cited above (Pet., p. 10). They argue instead that the alleged denial of due process of law came into the case at the point where the trial court declined to vacate the default judgment (*Ibid.*), and to accept their excuse that they failed to comprehend the language of the interrogatories, and, further, that they relied entirely upon their then attorney, Mr. Kaufman (Pet., p. 9).

They admit that Mr. Kaufman repeatedly warned them that they should supply specific answers to these interrogatories (Pet., pp. 3-4; D39a-15 to 17). They offer no explanation whatsoever for their failure to discuss these interrogatories with Mr. Kaufman on the numerous occasions that they were thereafter in his office (D54a-25 to 28). They ask this Court to overrule the state courts on the wholly untenable basis that "a client's burden is diminished and his sense of responsibility mitigated when that lawyer *does* take his case" (Pet., p. 10). (As we have noted, this argument was never presented to the state courts (*Cf., Pet.*, p. 5)).

Petitioners claim that they were not guilty of "culpable negligence" because allegedly their "biggest offense was in their failure to understand the questions presented to them, to understand the importance of the requirement to answer them and then to expand on those answers, and finally they failed to understand the grave consequences that would follow if they did not" (Pet., p. 9). This representation is squarely denied by Mr. Kaufman's affidavit that he wrote defendant Levy "a formal letter advising him that unless the interrogatories were answered their suit might be lost" (D54a-14 to 16).

They contend most unconvincingly that they acted as "reasonable men" and as "businessmen caught up in their business problems," by leaving the matters entirely to their lawyer (Pet., pp. 9-10). Their lawyer averred otherwise (D54a-5 to 28). They do not explain how their attorney was supposed to provide specific answers to interrogatories demanding facts in their own knowledge, or to be determined from their business books, and, further, how such answers would comply with the rule requiring that they personally swear to or certify these answers. *Cf.* New Jersey Revised Rule 4:23-4:

> "Interrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or if the party served is a public or private corporation or a partnership or association, then by any authorized officer or agent who shall furnish all information available to the party."

Their own neglect is ignored; that of their former attorney is maximized. The trial court correctly held that their attempted justification of their neglect was totally insufficient, and that rather "the neglect was deliberate and must not be sanctioned". (PR7a) *Cf. Brookdale Mill* v. *Rowley,* 218 F. 2d 728, 729 (6th Cir. 1954). This Court has held, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U. S. 220, 227 (1925).

Here, the Appellate Division affirmed, and the Supreme Court denied certification. As this Court held in *Graver Mfg. Co.* v. *Linde Co.,* 336 U. S. 271, 275 (1949), "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. (citing cases)."

The attempt at this late date to seek the Court's indulgence for their inexcusable neglect by contending that the fault was instead exclusively that of their former attorney, Mr. Kaufman, must be rejected for two separate reasons. First, it is not properly before this Court since it was not raised before the State courts. See our discussion, *supra*. Second, it is settled that clients are bound by the negligent acts of their attorneys. *Link* v. *Wabash Railroad Company*, 370 U. S. 626, 633-635 (1962).

New Jersey has applied such rule frequently. In *Schulwitz* v. *Schuster*, 27 N. J. Super. 554, 559, 99 A. 2d 845, 848 (App. Div. 1953), the court dealt, as here, not only with the inexcusable neglect of the defendants' attorney, but also with the defendants' own inexcusable neglect. The court there inquired (99 A. 2d at 848): "Nor does it satisfactorily appear why the defendants did not act more expeditiously in their own behalf." In *Williams* v. *Knox*, 10 N. J. Super. 384, 389-390, 76 A. 2d 712, 715 (Law Div. 1950), the court held:

> "The negligence of an attorney may be excusable when attributable to an honest mistake, an accident, or any cause which is not incompatible with proper diligence. The diligence required of an attorney is such as a man of ordinary prudence gives to his own important business. No ordinarily prudent or reasonable man would have ignored the case against him from January 4, 1949, until August 7, 1950, as the defendant and her attorneys appear to have done."

See also, *Ballurio* v. *Campanaro*, 30 N. J. Super. 548, 551-552, 105 A. 2d 427, 428 (App. Div. 1954); *Sweeney* v. *Veneziano*, 70 N. J. Super. 185, 190-191, 175 A. 2d 241, 244 (App. Div. 1961).

The determination by the trial court here that "excusable neglect" had not been shown by the defendants is entirely consonant with the parallel reasoning by circuit courts of appeal in cases where this Court has denied certiorari. *Pioche Mines Consol., Inc.* v. *Dolman*, 333 F. 2d 257, 269 (9th Cir. 1964), cert. denied, 380 U. S. 956 (1962); *Draisner* v. *Liss Realty Co.*, 211 F. 2d 808, 94 U. S. App. D. C. 53 (App. D. C. 1950), cert. denied, 348 U. S. 877 (1954); *First Iowa Hydro Elec. Cooperative* v. *Iowa-Illinois Gas & Elec. Co., supra*, 245 F. 2d at 628 (8th Cir. 1957), cert. denied, 355 U. S. 871 (1957). See also, *Ferraro* v. *Arthur M. Rosenberg Co.*, 156 F. 2d 212, 214 (2d Cir. 1946); *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. C. Neb. 1942); *Paramount Packaging Corp.* v. *H. B. Fuller Co. of N. J.*, 190 F. Supp. 178, 181 (D. C. E. D. Pa. 1960); *Canup* v. *Mississippi Valley Barge Line Company*, 31 F. R. D. 282 (D. C. Pa. 1962).

It is merely captious to argue that, faced with the record shown here, where its repeated discovery orders were flouted and ignored by the defendants, the trial court should nevertheless have lowered its "level of indulgence" (Pet., p. 11) because the defendants claimed that they were "really sincere" (Pet., p. 10) in their contention that they "failed to understand the grave consequences that would follow if they did not" comply with the court's discovery orders (Pet., p. 9). The issue here is merely one of a state court's appraisal of their credibility. As in *Jackson* v. *Heiser*, 111 F. 2d 310, 313 (9th Cir. 1940):

> "* * * the court apparently disbelieved the statement and disbelieved the evidence, if any, tending to support it. On this, we cannot say that the court erred; much less that it abused its discretion."

C. A Showing of Excusable Neglect Is a Prerequisite for Vacating a Default Judgment.

Petitioners argue that their case had merit (Pet., p. 7). We disagree. The trial court declined to pass upon the merits, holding that "the first step to be shown is that there was some excusable neglect" (D91a-23 to 28; PR7a). Its ruling reflected settled law. Thus, in *Nemeth* v. *Otis Elevator Co.*, 55 N. J. Super. 493, 498, 151 A. 2d 58, 60 (App. Div. 1959), the Appellate Division held:

> "It is as true today as it was in 1833 that a judgment will not be reopened without a showing of excuse for the default as well as merit. A party 'is not to be penalized or made accountable for the indifference, or inertia,' of his adversary. Hanover Trust Co. v. Rizzo, 110 N. J. L. 581, 583 (Sup. Ct. 1933). 'It is a settled rule that a default judgment will not be reopened on the mere ground of neglect or inadvertence. To justify the vacation of a default judgment, there must be factual proof that the neglect or inadvertence is actually excusable.' (citing cases)."

In the face of the plethora of decisions cited above, it is clear that there is no merit to the claim by the defendants that, "The denial of the relief was contrary to the abundance of cases in New Jersey and the federal arena" (Pet., p. 19).

POINT III

No discrepancy exists between the penalties that may be assessed against a plaintiff for not complying with discovery procedures and those that may be assessed against a defendant and accordingly there was no denial of due process here for this sham reason.

Petitioner's second point (Pet., pp. 12-14) is patently frivolous and is even less worthy of serious consideration by this Court. *Cf., Klotz* v. *Lee,* 21 N. J. 148, 155, 121 A. 2d 369, 372 (1956); *Stiers* v. *Union City,* 41 N. J. 243, 196 A. 2d 5 (1963).

The sham argument is advanced that New Jersey Revised Rule 4:27-2 (quoted at Pet., pp. 12-13) contains an unconstitutional distinction with respect to sanctions that may be imposed upon a plaintiff and those that may be imposed upon a defendant. It is claimed that if one is a plaintiff and refuses to comply with discovery procedures, one's worst punishment will be a dismissal *without prejudice* whereas a default judgment entered against a defendant is final and conclusive (Pet., p. 14). On this entirely fictitious foundation, an argument is made that there was here denial of due process of law justifying review by this Court.

Two cases are cited in support of this argument. Neither supports it. *Burke* v. *Central Railroad Co. of New Jersey,* 42 N. J. Super. 387, 396, 126 A. 2d 903, 908 (App. Div. 1956) (Pet., p. 14) holds merely that a trial court did not abuse its discretionary powers "under the peculiar circumstances of this case" in refusing to dismiss the plaintiff's case with prejudice. *Mitchell* v. *McDonald,* 114 Mont. 292, 136 P. 2d 536 (Sup. Ct. Mont. 1943) (Pet., p. 14) appears entirely irrelevant to the argument. It deals with the rule

that after a ward attains his majority, his guardian is no longer entitled to represent him in pending litigation. Its only conceivable applicability to the Petition here appears to be the dictum that "the constitutional provision that property may not be taken without due process of law means that the owner is entitled to his day in court." 136 P. 2d at 542. Of course, under our system of law where an attorney appears in a representational capacity, defendants here had their day in court each time their attorney received notice on their behalf of a pending discovery motion, and they had an opportunity to appear in opposition to the motion. *Link* v. *Wabash R. Co., supra,* 370 U. S. at 633-634; *Wong Ho* v. *Dulles,* 261 F. 2d 456, 460 (9th Cir. 1958).

The purported "dichotomy of a rule granting plaintiffs one justice and defendants another" (Pet., p. 14) is simply nonexistent. Defendants have conjured up an "imaginary horrible" in their desperate last-ditch effort to avoid the consequences of their willful and inexcusable thwarting of the trial court's discovery orders.

Defendants have failed to advise the Court of the discretionary power to dismiss a complaint with prejudice granted the trial courts by New Jersey Revised Rule 4:42-2. This rule provides:

> "4:42-2. Involuntary Dismissal; Effect Thereof
>
> "(a) *For failure of the plaintiff* to cause a summons to issue within 10 days after filing the complaint or to prosecute an action for 6 months, or *to comply* with these rules or *any order of court,* the court in its discretion may on motion of defendant dismiss an action or any claim against him. *Such a dismissal shall be without prejudice unless otherwise specified in the order.*" (Emphasis supplied.)

Accordingly, under the appropriate facts, the trial court may, in the exercise of its discretionary powers, do exactly what the petitioners allege it may not do.

Decisional law in New Jersey is to the same effect. The guide lines set out by the Supreme Court in New Jersey for application of sanctions are not limited to defendants. In *Lang* v. *Morgan's Home Equipment Corp., supra,* 78 A. 2d at 708, that court made it clear that the ultimate sanctions for refusal to comply with discovery orders apply to the "offending party" (without distinction as to plaintiff or defendant) who is to be given the alternative of complying promptly with the order or of refusing and suffering the consequences. In *Mayflower Industries* v. *Thor Corp.,* 17 N. J. Super. 505, 86 A. 2d 293 (Ch. Div. 1952), appeal dismissed, 20 N. J. Super. 39, 89 A. 2d 277 (App. Div. 1952) the plaintiff voluntarily moved for dismissal without prejudice allegedly on the advice of its counsel that thereby inspection of the records of an affiliated corporation would be avoided. The court instead ordered the complaint dismissed with prejudice. The Appellate Division refused to vacate such dismissal with prejudice.

In *Costello* v. *United States, supra,* 365 U. S. at 286-287, this Court made it clear that a "*sua sponte* dismissal by the Court for failure of the plaintiff to comply with an order of the Court" should be treated as a final and binding adjudication on the merits, pursuant to the terms of Federal Rule of Civil Procedure 41 (b), U.S.C.A.

Nasser v. *Isthmian Lines, supra,* 331 F. 2d 124, holds that dismissal of a seaman's complaint in an earlier action under the Federal Rules of Civil Procedure for failure to answer interrogatories operated as an adjudication upon the merits, barring maintenance of a subsequent suit. The resemblance to the facts of the instant case is striking (331 F. 2d at 128):

"As we have suggested, Nasser had countless opportunities to challenge the validity of the order and judgment of dismissal. His counsel was fully aware of the return date of the motion to dismiss * * * Although the motion was finally heard approximately three months after it was initially returnable, the plaintiff and his counsel did not appear to argue before Judge Bryan that the failure to answer interrogatories might have been excusable as was the case in Societe Internationales Pour Participations Industrielles et Commerciales, S. A. Rogers, supra, or that sanctions less drastic than dismissal were called for. * * * In the light of so sad a history of dilatory conduct, a holding that Nasser may simply ignore his default and the court's order and judgment—as if they did not exist—and now raise the same claims that were dismissed by Judge Bryan would be to place a premium on default, carelessness, and callousness to duty, and would tend to consign the procedural rules designed for expedition in litigation to oblivion. If this conduct were condoned, litigants or their counsel could turn a deaf ear to the processes of the court with impunity, suffering dismissal only to arise phoenix-like in new actions based on the same allegations which the plaintiffs years prior failed to litigate. In a judicial system operating within a framework of rules created 'to secure the just, speedy, and inexpensive determination of every action;' such a situation is patently intolerable. Rule 1, F. R. Civ. P."

See also, *Interstate Cigar Co. v. Consolidated Cigar Co.*, 317 F. 2d 744, 746 (2d Cir. 1963); *Mooney* v. *Central Motor Lines*, 222 F. 2d 569, 571-572 (6th Cir. 1955); *Textile Products* v. *Formax Mfg. Corp.*, 13 F. R. D. 302 (D. C. Mich. 1952); *Thorn* v. *Harrisburg Trust Co.*, 32 F. R. D. 352 (D. C. M. D. Pa. 1962).

POINT IV

The defendants are bound by the negligent acts of their attorneys.

No ground for granting certiorari is found in Petitioners' third point that a judgment should not have been entered against them for procedural wrongdoing when the acts of their attorney constituted all or even part of the wrongdoing.

We have previously shown that this issue is not properly before this Court since it was never raised in the state courts.

It would in any event provide no basis for granting certiorari since the law is settled that litigants are bound by the negligent acts of their attorneys.

As this Court held in *Link* v. *Wabash R. Co., supra,* 370 U. S. at 633-634, the defendant "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" There is nothing whatsoever in the instant case to arouse the sympathy which led to a dissent in *Link, supra,* 370 U. S. at 636-649.

Whatever might have been Mr. Kaufman's reasons for ignoring the notices of motion and orders served upon him, defendants cannot reopen the default judgment by arguing that this constitutes excusable neglect under New Jersey Revised Rule 4:62-2 (Pet., pp. 2-3). *Nasser* v. *Isthmian Lines, supra,* 331 F. 2d at 129, is again close on its facts:

> "And while Nasser, through his new attorney, seeks to fasten responsibility for the dismissal of his first action upon the derelictions of his then counsel his contentions in this regard must plainly be rejected. As Judge Bryan observed in denying the motion to vacate, 'plaintiff was frequently in the Port of New York * * * and never took the trouble to communicate with his attorney concerning his pending action or what might happen concerning it. In turn, his attorney could have had no difficulty in getting in touch with plaintiff if he wished to do so.'"

New Jersey has frequently held that the acts of an attorney are chargeable to his client. *Williams* v. *Knox, supra,* 76 A. 2d at 715; *Schulwitz* v. *Schuster, supra,* 99 A. 2d at 848; *Mayflower Industries* v. *Thor, supra,* 86 A. 2d at 297; *Ballurio* v. *Campanaro, supra,* 105 A. 2d at 428.

The federal courts apply the same rule. See, *e.g., Wheiles* v. *Aetna Life Ins. Co.,* 68 F. 2d 99, 101 (5th Cir. 1933); *Dalrymple* v. *Pittsburgh Consolidation Coal Company,* 24 F. R. D. 260, 262 (D. C. Pa. 1959); *Ledwith* v. *Storkan, supra,* 2 F. R. D. at 544.

CONCLUSION

This case received the most careful consideration by the trial court, the Appellate Division, and the Supreme Court of New Jersey. These courts unanimously concluded that entry of the default judgment and refusal to vacate such judgment was proper under the circumstances here. The defendants' contention that such sanctions were constitutionally and otherwise improper is based upon such distortions of the record and such unsound contentions of law as to make this case completely inappropriate for review by this Court. Accordingly, it is respectfully submitted that a writ of certiorari should be denied with costs.

Respectfully submitted,

DAVID COHN,
Attorney for Respondents.

APPENDIX A

Court's Oral Opinion on Application for Relief from Judgment (February 5, 1965)

* * *

(commencing at 45-12; see also D84a, *et seq.*):

The Court: This matter comes on before the Court on the adjourned return date of an order to show cause dated December 31, 1964 signed by Judge Giuliano who was the standing judge on duty during the Christmas court recess.

There is also returnable today a motion to amend the judgment to change the first name of the individual defendant, Morton Levy, to his proper name rather than as pleaded erroneously as Milton Levy.

The Court has read the affidavits submitted together with the briefs of counsel and has heard and considered the oral argument.

(46) A default judgment was entered in this case and after proofs taken an order for judgment was signed by Judge Kolovsky on October 19, 1964.

Rule 4:62-2 provides that default judgments may be set aside in accordance with the requirements of that rule on motion with briefs and upon such terms as are just. The Court may set aside a default judgment for the following reasons: mistake, inadvertence, surprise or excusable neglect or any other reason justifying relief from the operation of the judgment or court order.

The default in this case arose upon failure of the defendants to answer more specifically certain interrogatories

which had been served on the prior attorney for the defendants. The defendants in their affidavits submitted on behalf of this motion or support of this motion set forth that excusable neglect existed and that they have a meritorious defense to the action of the plaintiff.

In order to more fully understand what transpired in this matter, the Court has reviewed the County Clerk's jacket and I find that on January 10th, 1964, a complaint was filed and thereafter, on February 18th, 1964, the summons was filed showing (47) personal service on the individual defendant, Morton Levy and on the corporate defendant.

On January 29, 1964 an answer and counter-claim was filed by the defendants. Thereafter it would appear that interrogatories were served by the plaintiff on the attorney for the defendant and I base that assumption on the fact that on April 8th, 1964 a notice of motion to strike the answer filed for failure to answer interrogatories was made, which motion was returnable before the court on April 17th, 1964.

On April 17th, 1964 Judge Lora signed an order requiring the defendant to answer interrogatories within 30 days or the answer would be stricken on notice.

On May 27th, 1964 a notice of motion was filed, which motion was to strike the answer for failure to answer the interrogatories as ordered by Judge Lora on April 17th, 1964. This motion was returnable June 5th, 1964.

The affidavit of Albert L. Cohn filed in support or in opposition to the present motion sets forth that the answers to the interrogatories were served on him at his home the day before the (48) return date of said motion.

Appendix A

Thereafter the Court finds that on July 1st, 1964 there was filed in the County Clerk's Office a notice of motion for an order to compel more specific answers to interrogatories, which motion was returnable July 9th, 1964.

On July 9th, 1964 an order of Judge Lora indicates that no one appeared on behalf of the defendant and an order was entered requiring the defendants to answer more responsively the interrogatories previously served within 20 days.

On August 12th, 1964 a notice of motion returnable August 20th, 1964 was filed, to strike the answer for failure to comply with the order of Judge Lora of July 9th, 1964.

Said motion came on before this Court on August 20th at which time the Court heard the oral representations and argument of Murray R. Miller, an attorney associated with David and Albert L. Cohn, attorneys for the plaintiff, and at that time and on that date this Court signed an order requiring the defendants to answer the interrogatories more specifically within days or the answer would be stricken without notice.

(49) On September 22nd, 1964 an affidavit of said attorney, Murray Miller, was submitted to this Court stating that the order of August 20th, 1964 had been forwarded to the attorney for the defendant on August 20th and that no answers to the interrogatories had been received.

The affidavit of Albert L. Cohn submitted in opposition to the present motion indicates that said order of the court of August 20th, 1964 was mailed to the attorney for the defendant on August 20th, 1964.

Appendix A

On September 23rd this Court signed an ex parte order striking the answer and ordered that the default be entered.

Thereafter, on October 5th, 1964 there was filed in the Clerk's Office a notice of taking proofs for the entry of judgment, which notice was addressed to the previous attorney for the defendants setting October 14, 1964 as the date for the taking of said proofs. There was attached thereto proof of mailing by certified mail and the affidavit of attorney Cohn in opposition to this motion indicates that it was received by the previous attorney for the defendants on (50) October 6th, 1964 and he attaches to his affidavit a copy of the return receipt showing the receipt of said notice by the prior attorney for the defendants.

On October 14th, 1964 proofs were taken in open court before Judge Kolovsky and on October 19th an order for judgment was signed by Judge Kolovsky.

Mr. Cohn's affidavit further indicates that a copy of the order for judgment was mailed to the previous attorney for the defendants on October 22nd and his affidavit also indicates that he received a notice from the Superior Court Clerk's Office indicating that the entry of judgment was made in the Clerk's Office and he argues that since it is the practice of the Clerk's Office to notify both attorneys of record of the entry of a judgment that it may be assumed that the Clerk's Office notified the attorney for the defendants of the entry of said judgment.

Mr. Cohn has represented to the Court that on or about December 11th, 1964 a levy was made by the Hudson County sheriff on the defendant's bank account and the affidavits of the defendants (51) indicate that they first conferred with their present counsel on or about December 16, 1964.

Appendix A

Now, the affidavits of the individual defendants, as I said before, set forth that they contend that they have a just and meritorious defense. They further offer to post a bond to secure whatever judgment the plaintiff might obtain if the default is set aside and the matter litigated. They further set forth that they were unaware that their attorney had pleaded a counterclaim and they state that if they are permitted to defend they will withdraw their counterclaim. They further set forth in their affidavits that the omissions in making specific answers to the interrogatories was the result of meager and imperfect communication between the defendants and their counsel. They state that the interrogatories were mailed to them by their previous attorney with a request that they prepare the answers and send them back to the attorney rather than being formulated as the result of any personal conferences. The individual defendant Levy states that he answered the interrogatories as best he could and transmitted them to his attorney. He further states (52) in his affidavit that though he had several letters from his attorney requesting that the blank spaces be filled in, they, the defendants, never had a personal conference at which time he could explain the problems to his attorney.

The affidavit of the present attorney for the defendants sets forth that he has examined the file of his client's prior attorney and that the file does not reveal nor does the attorney remember receiving notice of taking proofs for the entry of judgment as required by rule 4:56-2(b). The affidavit further states that he did not submit an affidavit of his predecessor because said attorney was away for the holidays, referring to the Christmas-New Year's holidays.

The present attorney for the defendants further states that he has not submitted an affidavit on the argument of

this motion since his predecessor has had some family problems that past week.

The Court is aware of the fine reputation of the previous attorney for the defendants and it is significant to this Court that the defendants have failed to submit any affidavit by their previous attorney.

(53) The order to show cause in this case was obtained on December 31st and if Mr. Kaufman was away for the holiday and if he were, I see no reason why a proper affidavit could not have been obtained from him between that time and this past week.

The present motion was returnable before this Court a week ago, namely, January 29th, and it must have been returnable before the Court at least once before that time, since the order to show cause sets January 8th as being the return date for the argument of the order to show cause.

This Court is of the opinion that there was neglect on the part of the defendants, but is not convinced that that neglect was such excusable neglect as would cause this Court to set aside the default judgment. The individual defendants themselves admit in their affidavits that they had been requested by their own attorney and by the language employed in the affidavits this Court would believe that they were requested more than once to complete the answers to their interrogatories. The constant failure to comply with the court rules is evident by the chronology that the Court has set (54) forth above, and it would appear to this Court that the failure or neglect to comply with the various orders of the court and the rules of court were not such neglect as should be excused.

Appendix A

There is no question but what all courts should attempt to decide matters to do substantial justice to all parties. However, the very purpose in the Supreme Court promulgating rules is that they be compiled with. And while some latitude should be shown where there is a reason to extend time, I find nothing in this case which would indicate that any application had ever been made to this Court or any other judge sitting for an extension of time, and I am of the opinion, from a review of the file, that the neglect was deliberate and must not be sanctioned.

The Court has purposely not passed upon the allegation that a meritorious defense is claimed, since it is of the opinion that the first step to be shown is that there was some excusable neglect.

The order to show cause of December 31st, 1964 will therefore be vacated.

APPENDIX B

Court's Oral Opinion on Reargument of Application for Relief from Judgment (March 5, 1965)

* * *

(commencing at P64a)

The Court: Of course, to answer your query as to whether or not the Court could feel comfortable in knowing that a judgment of $23,000 had been recovered by the plaintiff against the defendants when the plaintiff wasn't entitled to it, let me just say that it wouldn't bother the Court's comfort one bit so long as the Court was convinced that the defendants didn't care that such a judgment had been entered against them. And that is the impression that I have to receive.

(P65a) Now, I went through in my original decision of this motion a long chronology setting forth what had taken place and what had not taken place.

Now, if someone sues a defendant for $23,000 or more and the defendant himself isn't interested enough to protect himself and wilfully neglects to defend himself and allows the plaintiff to enter such judgment, I don't think that this is a travesty on justice. He has received exactly what he has asked for and that's my opinion of what took place here.

Now, I see nothing in Mr. Kaufman's affidavit nor nothing in your application here which would change my mind one bit from the decision I made some several weeks ago.

* * *

Appendix B

(commencing at P67a)

The Court: Of course, we talk about punishing a couple of bad boys. However, from what I have heard these defendants are not babes in the woods. These people were competent business people, and I just can't see how they can now, after this length of time, after the plaintiff levied on their bank account and—

Mr. Chasan: They got $900. This isn't what galvanized them into action because Mr. Kaufman says he didn't know until just before the levy, he didn't know until he got notice from the clerk—

The Court: From the sheriff.

Mr. Chasan (continuing):—from the clerk that a judgment had been entered. That was the first he knew about it. So far as my people are concerned, the first thing they knew about it was a levy by the sheriff.

The Court: Of course, the return receipts from his own office indicate that he either knew about it or should have known about it.

Mr. Chasan: Well, suppose he should have known about it and didn't. Suppose—how—I'll (P68a) return the compliment, your Honor, how should this be held to affect these defendants? Is that not justifiable neglect, the fact that he knew about it and—

The Court: That singular incident, standing all by itself, certainly would constitute excusable neglect, but we went all through that the last time and the court found that there was no excusable neglect and, as I said just a moment ago, I have heard nothing on the argument which would persuade me to change my mind.

Appendix B

Mr. Chasan: I think the problem between your Honor and myself is probably a difference in philosophy. It is my philosophy that the first quality of justice is mercy.

The Court: Well, that may be. Perhaps we don't see eye to eye on it. I thought that my philosophy followed the same as what you state yours is, but we may have a different quality.

The motion will be denied.